Supreme Court, U.S.
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NO. 99-1746

IN THE

SUPREME COURT OF THE UNITED STATES

WATERMAN STEAMSHIP CORPORATION

PETITIONER

VERSUS

HERBERT ANDERSON

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3 pp

QUESTIONS PRESENTED FOR REVIEW

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257 (a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

II. WHETHER OR NOT THE LOUISIANA STATE COURTS WERE CORRECT IN UPHOLDING RESPONDENT'S ARGUMENT THAT: "THE TEST USED BY THE COURTS AND MORE PARTICULARLY THE FEDERAL FIFTH CIRCUIT, IN DETERMINING WHETHER OR NOT THE EXCLUSIVITY PROVISIONS OF THE SUITS IN ADMIRALTY ACT APPLY, IS "OPERATIONAL CONTROL". THAT IS WHO WAS IN CHARGE OF THE DAY TO DAY OPERATIONS OF THE VESSEL WHERE THE RESPONDENT WAS INJURED. THIS TEST IS USED REGARDLESS OF WHETHER OR NOT THE INJURED SEAMAN IS MAKING JONES ACT NEGLIGENCE CLAIMS, OR THOSE AS WELL AS TRADITIONAL ADMIRALTY CLAIMS, SUCH AS UNSEAWORTHINESS AND CLAIMS FOR MAINTENANCE AND CURE.

III. WHETHER OR NOT THE LOUISIANA SUPREME COURT WAS CORRECT IN DENYING WRITS, AND THE FOURTH CIRCUIT COURT OF APPEAL WAS CORRECT IN DENYING PETITIONER'S APPLICATION FOR SUPERVISORY WRITS AND FINDING THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER WATERMAN STEAMSHIP CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS MATTER.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 1

ARGUMENTS 3

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257(a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT 3

II. WHETHER OR NOT THE LOUISIANA STATE COURTS WERE CORRECT IN UPHOLDING RESPONDENT'S ARGUMENT THAT: "THE TEST USED BY THE COURTS AND MORE PARTICULARLY THE FEDERAL FIFTH CIRCUIT, IN DETERMINING WHETHER OR NOT THE EXCLUSIVITY PROVISIONS OF THE SUITS IN ADMIRALTY

ACT APPLY, IS "OPERATIONAL CONTROL". THAT IS WHO WAS IN CHARGE OF THE DAY TO DAY OPERATIONS OF THE VESSEL WHERE THE RESPONDENT WAS INJURED. THIS TEST IS USED REGARDLESS OF WHETHER OR NOT THE INJURED SEAMAN IS MAKING JONES ACT NEGLIGENCE CLAIMS, OR THOSE AS WELL AS TRADITIONAL ADMIRALTY CLAIMS, SUCH AS UNSEAWORTHINESS AND CLAIMS FOR MAINTENANCE AND CURE 4

III. WHETHER OR NOT THE LOUISIANA SUPREME COURT WAS CORRECT IN DENYING WRITS, AND THE FOURTH CIRCUIT COURT OF APPEAL WAS CORRECT IN DENYING PETITIONER'S APPLICATION FOR SUPERVISORY WRITS AND FINDING THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER WATERMAN STEAMSHIP CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS MATTER 25

CONCLUSION 30

APPENDIX:

1. February 18, 2000 Louisiana Supreme Court decision ... App. 1

2. December 17, 1999 ruling by the Louisiana Court of Appeal for the Fourth Circuit ..... App. 2

3. Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated September 24, 1999 ..... App. 4

4. Reasons for Judgment of the Trial Court for the Civil District Court for the Parish of Orleans, dated October 7, 1999. ... App. 6

5. Petition for Damages . . . . . App. 26

6. Exception and Answer . . . . . App. 32

7. 28 U.S.C.A. § 1257 (West 1993) . . . . . App. 38

8. 46 U.S.C.A. § 741 (West Supp. 1999) . . . . . App. 38

9. 46 U.S.C.A. § 742 (West Supp. 1999) . . . . . App. 39

10. 46 U.S.C.A. § 745 (West 1975) . . . . . App. 40

11. *Louisiana Code of Civil Procedure* art. 966
(West Supp. 2000) . . . . . App. 41

12. *Louisiana Code of Civil Procedure* art. 968
(West 1984) . . . . . App. 43

13. 28 U.S.C.A. § 1333 (West 1993) . . . . . App. 43

14. 46 U.S.C.A. § 688 (West Supp. 1999) . . . . . App. 44

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). 4

Daniels v. Florida Power and Light Company, 317 F.2d 41 (5th Cir. 1963), *cert. denied,* 375 U.S. 832, 84 S.Ct.78, 11 L.Ed.2d 63 (1963). 7

Davis v. Bd. Of Supervisors of La. State University et al, 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La.6/26/98), 719 So.2d 1288 29

Davis v. Speciality Diving, Inc., 98-0458, 98-0459 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, *writ denied,* 99-1852 (La. 10/8/99); ____So.2d____. 3, 4

Degruy v. Degruy, 98-1416, 98-1811 (La. App. 4th Cir. 1/27/99), 728 So. 2d 914 4

Favorite v. Marine Personnel and Provisioning, Inc., 955 F.2d 382 (5th Cir. 1992) 13, 14

Godeaux v. Dynamic Industries, Inc., 864 F. Supp. 614 (E.D. Tex. 1994) 7

Holmes v. Daybrook Fisheries, Inc., 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ denied* 99-C-1571 (La. 9/24/99) ___So.2d___.....8

Jefferson v. City of Tarrant, Alabama, ____U.S.____, 118 S.Ct. 481, ____L.Ed.2d.____(1997) 4

Morales-Melendez v. Steamship Mut., 763 F. Supp. 1174 (D. Puerto Rico 1991). 21-24

Nelson v. Research Corp. Of University of Hawaii, 805 F. Supp. 837, (D. Hawaii 1992) 20, 21

Servis v. Hiller Systems Inc., 54 F.3d 203 (4th Cir. 1995), *cert. den.,* 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996). 20

Trautman v. Buck Steber, Inc., 693 F.2d 440 (5th Cir. 1982). . . 16-20

Vendetto v. Sonat Offshore Drilling Co., 97-3103 (La. 1/20/99), 725 So.2d 474, *rehearing denied,* 97-3103 (La. 2/12/99),_____ So.2d____, *cert. denied,*_____U.S.____,119 S.Ct. 2369, 2370, 144 L.Ed. 2d 773 (1999) 8

Williams v. Central Gulf Lines, 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990) 8-13

STATUTES

28 U.S.C.A. § 1333 (West 1993). 2

46 U.S.C.A. § 688 (West Supp. 1999). 2

28 U.S.C.A. § 1257 (West 1993). 3, 4

46 U.S.C.A. § 741 (West Supp. 1999). 6

46 U.S.C.A. § 742 (West Supp. 1999) 7-19

46 U.S.C.A. § 745 (West 1975) 9

Louisiana Code of Civil Procedure art. 966 (West Supp. 2000) . . . 3

Louisiana Code of Civil Procedure art. 968 (West 1984). 3

DECISIONS BELOW

The decisions of the Trial Court, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, not yet reported, appear in the Appendix.

JURISDICTIONAL STATEMENT

The rulings of the Louisiana State Courts which Petitioner has presented to this Court, do not qualify as a final judgment within the meaning of 28 U.S.C. §1257(a). Thus, Petitioner's writ application should be dismissed for want of a final judgment.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The statutory provisions involved in this case are cited here as follows, and the full text of the cited provisions are set out in the Appendix.

28 U.S.C.A. § 1333 (West 1993).
46 U.S.C.A. § 688 (West Supp. 1999).
28 U.S.C.A. § 1257 (West 1993).
46 U.S.C.A. § 741 (West Supp. 1999).
46 U.S.C.A. § 745 (West 1975).
Louisiana Code of Civil Procedure art. 966 (West Supp. 2000).
Louisiana Code of Civil Procedure art. 968 (West 1984).

STATEMENT OF THE CASE

On May 1, 1996, Plaintiff-Respondent, Herbert Anderson, (hereinafter referred to as "Respondent"), was employed by Defendant-Petitioner Waterman Steamship Corporation, (hereinafter referred to as "Petitioner"), as a Seaman and Assistant Cook Utility of the crew. Respondent was permanently assigned to a vessel in navigation which was being operated by his employer, Petitioner Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Respondent was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Respondent alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Respondent Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Respondent sustained injuries as a result of this accident. Respondent does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

On April 30, 1997, Respondent filed suit against his employer Waterman Steamship Corporation. (Appendix 5). In his Petition for Damages, Respondent is making not only a Jones Act negligence claim, (46 U.S.C. § 688), but also claims for unseaworthiness and maintenance and cure. The jurisdiction of the State Court is premised on the "savings to suitors" clause. (28 U.S.C. § 1333).

Petitioner filed two exceptions and a Motion for Summary Judgment in the trial court. After both parties filed several memorandums, and exhibits, a hearing was held on the Motion for Summary Judgment on September 3, 1999. At that time the Trial Judge issued an oral ruling denying the Motion for Summary Judgment, and overruling the two exceptions. The Honorable Trial Court Judge instructed undersigned counsel to prepare a written Judgment and written Reasons for Judgment. On September 24, 1999, the Judgment denying the Motion for Summary Judgment was signed. Notice of Signing of Judgment was issued on October 15, 1999. (Appendix 3). On October 7, 1999, the Reasons for Judgment were signed. Notice of Signing of Judgment for the Reasons for Judgment was issued on October 8, 1999. (Appendix 4).

On November 10, 1999, Petitioner filed an Application for Supervisory Writs with the Fourth Circuit Court of Appeal seeking a review of the Trial Court's ruling denying Waterman Steamship Corporation's Motion for Summary Judgment. Respondent Herbert Anderson, filed a Response to the Application for Supervisory Writs on November 29, 1999. On December 17, 1999, the Fourth Circuit issued a two page decision denying the application for Supervisory Writs. (Appendix 2).

On December 28, 1999, Petitioner filed an Application for Supervisory Writs with the Louisiana Supreme Court seeking a review of the Fourth Circuit Court of Appeals denial of their Application for Supervisory Writs. On February 18, 2000, the Louisiana Supreme Court denied Petitioner's Writ Application. (Appendix 1).

Respondent Herbert Anderson, now files this response arguing that the Trial Court's ruling denying the Motion for Summary Judgment, which was affirmed by the Fourth Circuit, and the Louisiana Supreme Court's denial of Petitioner's Application for Supervisory Writs, was correct, and should be upheld.

ARGUMENTS

I. THE RULINGS OF THE LOUISIANA STATE COURTS WHICH PETITIONER HAS PRESENTED TO THIS COURT, DO NOT QUALIFY AS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257 (a). THUS, PETITIONER'S WRIT APPLICATION SHOULD BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

Respondent raises as an initial issue, that this Court lacks jurisdiction to review the interlocutory rulings of the Louisiana State courts. *Louisiana Code of Civil Procedure* art. 966 (West Supp. 2000); *Louisiana Code of Civil Procedure* art. 968 (West 1984). "[T]he denial of a motion for summary judgment is an interlocutory judgment and is not appealable." *Davis v. Speciality Diving, Inc.*, 98-0458, 98-0459 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669; 98-0458, 98-0459 at p. 5, *writ denied*, 99-1852 (La.

10/8/99); ____So.2d____ (citations omitted). *Degruy v. Degruy,* 98-1416, 98-1811 (La. App. 4th Cir. 1/27/99), 728 So. 2d 914, 917-918; 98-1416, 98-1811 at pp. 5-6.

This is because the state courts have not yet issued a final judgment in this matter. The state courts decisions are not final because there are further proceedings to be had in the state trial court; an entire trial on the merits. It is significant that there will be other issues of federal maritime law considered by the trial court in this maritime personal injury case. Thus, the rulings of the Louisiana state courts which Petitioner has presented to this court do not qualify as a final judgment within the meaning of 28 U.S.C. § 1257 (a). *Jefferson v. City of Tarrant, Alabama,* ___U.S.___, 118 S.Ct. 481, ____L.Ed.2d.____(1997). *Adams v. Robertson,* 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). It is respectfully submitted that Petitioner's writ application should be dismissed for want of a final Judgment.

II. THE LOUISIANA STATE COURTS WERE CORRECT IN UPHOLDING RESPONDENT'S ARGUMENT THAT: "THE TEST USED BY THE COURTS AND MORE PARTICULARLY THE FEDERAL FIFTH CIRCUIT, IN DETERMINING WHETHER OR NOT THE EXCLUSIVITY PROVISIONS OF THE SUITS IN ADMIRALTY ACT APPLY, IS "OPERATIONAL CONTROL". THAT IS WHO WAS IN CHARGE OF THE DAY TO DAY OPERATIONS OF THE VESSEL WHERE THE RESPONDENT WAS INJURED. THIS TEST IS USED REGARDLESS OF WHETHER OR NOT THE INJURED SEAMAN IS MAKING JONES ACT NEGLIGENCE CLAIMS, OR THOSE AS WELL AS TRADITIONAL ADMIRALTY CLAIMS, SUCH AS UNSEAWORTHINESS AND CLAIMS FOR MAINTENANCE AND CURE.

Petitioner Waterman filed the Motion for Summary Judgment in the Trial Court contending that "[t]here are no genuine issues as to any material facts, and Waterman is entitled to judgment as a matter of law because liability for plaintiff's accident

rests exclusively with the United States Government pursuant to the Suits in Admiralty Act. Waterman hereby formally amends its Exception of No Right of Action or No Cause of Action by moving for alternative relief of summary judgment." (Petitioner's Reply Memorandum, p.1). However, Respondent argued and the Trial Court agreed that there are numerous disputed issues of material fact and law which preclude summary judgment in this matter. In Petitioner's Motion for Summary Judgment, Waterman appeared to be arguing that since Respondent is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure, that a different standard applies to determine whether or not the exclusivity provisions of the Suits in Admiralty Act apply. Petitioner further contended that "[c]laims for unseaworthiness and maintenance and cure, on the other hand, trigger potential *in rem* liability on the part of the vessel upon which the injury occurred...." (Petitioner's Reply Memorandum p., 2; citation omitted).

Petitioner then stated in their trial court Reply Memorandum, the following:

> At a later section of this brief, Waterman analyzes the degree of control that the United States exercised over the S/S MAJ. STEPHEN W. PLESS and shows that the degree of control was sufficient to render the United States, as charterer, liable for the alleged negligence of the crew of the S/S MAJ. STEPHEN W. PLESS. At this section of the brief, however, Waterman shows that the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS.
>
> (Petitioner's Reply Memorandum p., 2).

In his June 23rd Trial Court Memorandum, Respondent addressed in extensive detail the fact that the operational control of

the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer. Respondent will review those details later in this brief, but at this point will address Petitioner's *"in rem"* arguments.

One thing that is apparent from the face of Respondent's pleadings is that the S.S. MAJOR STEPHEN W. PLESS, has not been sued in this matter. The only Defendant is Waterman Steamship Corporation, Respondent's employer and the operator of the S.S. MAJOR STEPHEN W. PLESS. (Appendix 5).

Respondent cited section 741 of the Suits in Admiralty Act, 46 U.S.C. § 741, in support of their contention that "[c]laims arising on vessels operated for the United States are subject to the Suits in Admiralty Act." (Petitioner's Reply Memorandum p. 2).

Section 741 of the Suits in Admiralty Act provides in pertinent part as follows:

> **§ 741. Exemption of United States vessels and cargoes from arrest or seizure**
>
> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall after March 9, 1920, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions:....
>
> 46 U.S.C.A. § 741 (West Supp. 1999).

It is significant to note that the test used by the Courts and more particularly the Federal Fifth Circuit is "operational control".

That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

In the present case Respondent has asserted three causes of action against his employer and the operator of the S.S. MAJOR STEPHEN W. PLESS, Petitioner Waterman. [1]

The "operational control" test is used regardless of whether or not the injured seaman is making Jones Act negligence

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[1] As was discussed in more detail in Respondent's June 23rd Memorandum, Petitioner Waterman Steamship Corporation is not the actual owner of the S.S. MAJOR STEPHEN W. PLESS, rather Waterman is the operator of the boat pursuant to an Operating Contract, which will be discussed further in the next section. However, the law is clear that an owner or an operator can be held liable for unseaworthiness. In *Daniels v. Florida Power and Light Company,* 317 F.2d 41 (5th Cir. 1963), *cert. denied,* 375 U.S. 832, 84 S.Ct.78, 11 L.Ed.2d 63 (1963), the United States Fifth Circuit Court of Appeal stated that:

> The idea of seaworthiness and the doctrine of implied warranty of seaworthiness arises out of the vessel, and the critical consideration in applying the doctrine is that the person sought to be held legally liable must be in the relationship of an owner or operator of a vessel....
>
> *Id.* at 43. *See Also: Godeaux v. Dynamic Industries, Inc.,* 864 F. Supp. 614 (E.D. Tex. 1994), ("Only owners and operators may be liable for unseaworthiness of a vessel." *Id.* at 622, (citations omitted.))

claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. [2]

The United States Fifth Circuit Court of Appeal discussed the very issue raised in Petitioner's Motion for Summary Judgment in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990). [3] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay, became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

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[2] In *Holmes v. Daybrook Fisheries, Inc.,* 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ denied,* 99-C-1571 (La. 9/24/99) ____So.2d____, the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824, at pp. 2-3; 730 So.2d at 1008, (citation omitted).

[3] The Louisiana Supreme Court in *Vendetto v. Sonat Offshore Drilling Co.,* 97-3103 (La. 1/20/99), 725 So.2d 474, *rehearing denied,* 97-3103 (La. 2/12/99), ____So.2d____, *cert. denied,* ____U.S.____, 119 S.Ct. 2369, 2370, 144 L.Ed. 2d 773 (1999), when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. However, it is respectfully submitted that while technically the state court may not be bound by federal Fifth Circuit law, that the Fifth Circuit's reasoning is certainly persuasive authority for the Louisiana state courts.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.

Id. at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra,* in pertinent part provides as follows:

> **§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:...

46 U.S.C.A. § 745 (West 1975).

In *Williams, supra,* the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams,* and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams,* next extensively discussed the Suits in Admiralty Act. In *Williams, supra,* the Court discussed this issue as follows:

> **IV. THE SUITS IN ADMIRALTY ACT**
>
> The exclusivity provision may bar the appellant's suit against Central Gulf "where a remedy {against the United States} is provided by {the Suits in Admiralty Act}." 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman,* 693 F.2d at 444. In light of *Trautman,* we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the

exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by {the Suits in Admiralty Act}" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational control, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the

Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" Inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989) (quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). *See also* M.J. Norris, *The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this provision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for

costs "in and of itself does not transfer operational responsibility from the owner." *Mallard,* 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

In *Favorite v. Marine Personnel and Provisioning, Inc.,* 955 F.2d 382 (5th Cir. 1992), the Fifth Circuit also used "the concept of operational control", to determine whether or not the United States was the proper party defendant. In *Favorite supra,* the claims which were asserted by the Plaintiff were as follows:

In his complaint, Favorite alleges that during his employ by Management as a seaman aboard the USNS SEALIFT CARIBBEAN, on or

about January 16, 1988, he was injured as a result of the negligence of Management and the unseaworthiness of the vessel. Favorite filed suit against Personnel, individually and as agent for Management, under the Jones Act, 46 U.S.C. App. § 688, and the general maritime law. Favorite later amended his complaint to add Leasing and the United States as defendants.

Id. at 384, (emphasis added).

Thus, the Fifth Circuit when discussing "the concept of operational control" had before it in both *Williams,* and *Favorite,* not only Jones Act negligence claims, but also general maritime law claims.

In the Reasons for Judgment in the present case, the Honorable Trial Court Judge stated as follows:

> The Court finds the reasoning in *Williams, supra,* to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personnel and Provisioning, Inc.,* 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.,* 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.,* 54 F.3d 203, 208 (4th Cir. 1995), *cert. den.,* 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996); *Morales-Melendez v. Steamship Mut.,* 763 F. Supp.

1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii,* 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: *Pineiro v. United States,* 65 F. Supp. 191 (Dist. Ct., N.D. Cal.,S.D. 1945); *Burkholder v. United States,* 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States,* 86 F. Supp. 740 (U.S.D.C., S.D. N.Y. 1949); and *Western Tankers Corporation v. United States,* 1975 AMC 775 (U.S.D.C., S.D. N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern "operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

(Reasons for Judgment, dated October 7, 1999, Appendix 4, at pp. App. 17-18). [4]

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[4] The Trial Court Judge held that her reasoning was applicable to her ruling on the no cause of action and no right of action exceptions, which were before her, (but are not a part of this writ application,) as well as her ruling on Waterman's Motion for Summary Judgment.

In an earlier case, the Federal Fifth Circuit specifically discussed not only whether or not the government was liable for Jones Act negligence, but also whether or not they were liable for the unseaworthiness of a vessel which the Plaintiff contended was "operated by or for the United States", within the meaning of the Suits in Admiralty Act. In *Trautman v. Buck Steber, Inc.,* 693 F.2d 440 (5th Cir. 1982), the Court described the Plaintiff's claims and the procedural history of the case as follows:

> Appellant Richard Wayne Trautman, a salvage diver employed by a private corporation, was injured while working in the 1974 clearing of the Suez Canal, an operation coordinated by the governments of Egypt and the United States. Appellant brought an action against the United States for these injuries based upon the Suits in Admiralty Act, 46 U.S.C. §§ 741, et seq. and the Public Vessels Act, 46 U.S.C. §§ 781 et seq.
>
> Appellant appeals from the adverse decision of the district court, sitting without a jury and acting within its admiralty jurisdiction, which found that the United States was not liable for appellant's injuries. More specifically, the district court found that (1) the diving barge to which appellant was assigned was not "operated by or for" the United States within the meaning of the Suits in Admiralty Act, 46 U.S.C. § 741, and "accordingly the United States owed no warranty of seaworthiness" to appellant; (2) the United States exercised no operational control over appellant's work and was not responsible for the unsafe diving practices which "resulted in or contributed to" appellant's injury; and (3) the United States, through the Navy doctor assigned to the project and who examined the appellant, was not guilty of maritime medical malpractice. After careful consideration of this case, we affirm the decision of the lower court.

Id. at 441-442, (footnote citation omitted, emphasis added).

Thus, the Court used the operational control test to determine whether or not the United States was liable for an unseaworthiness claim, by an injured plaintiff.

In *Trautman, supra,* the Fifth Circuit explained their reasoning for affirming the lower court's ruling as follows:

> In his first assignment of error, appellant asserts that the trial court erred in concluding that the dive barge was not a vessel "operated by or for the United States" within the meaning of the Suits in Admiralty Act, 46 U.S.C. § 741, and, for that reason, the United States was not liable for the unseaworthiness of the barge or for the negligence of appellant's employer.
>
> In analyzing appellant's contentions, it should be noted that the Suits in Admiralty Act does not itself provide a cause of action against the United States. Instead, it only acts as a waiver of the sovereign immunity of the United States in admiralty suits. *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980). Thus, the act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim.
>
> The scope of the jurisdiction provided by the Suits in Admiralty Act is somewhat confusing. Prior to 1960, jurisdiction under the Act depended on whether the vessel involved was "...owned by... or in the possession of... or operated by or for the United States...." 46 U.S.C. § 741. *See De Bardeleben Marine Corp. v. United States,* 451 F.2d 140 (5th Cir. 1971).
>
> The 1960 amendment to 46 U.S.C. § 742, as discussed below, did much to undercut the

importance of this determination. However, it appears that a finding that the vessel in question was owned by, possessed by, or operated by or for the United States is still relevant to the question of whether the United States owed a duty of seaworthiness to the injured party. *See Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1962).

There has been little judicial interpretation of the relevant language of 46 U.S.C. § 741. *See Calmar Steamship Corp. v. United States,* 345 U.S. 446, 73 S.Ct. 733, 97 L.Ed. 1140 (1953); *Matson Navigation Co. v. United States,* 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932); *A.H. Bull S.S. Co. v. United States,* 105 F. Supp. 474 *(S.D.N.Y. 1952); Epstein v. United States,* 86 F. Supp. 740 (S.D.N.Y. 1949); *N.S. Byonnes & Son Dampskibsrederi Aktieselskab v. United States,* 298 F. 123 (S.D.N.Y. 1923). In the above cited cases, it appears that control by the United States is the crucial element in determining whether a case falls within the jurisdiction provided by § 741. This focus on control is stated more explicitly in *J.W. Petersen Coal & Oil Co. v. United States,* 323 F. Supp. 1198, 1205-06 (N.D. Ill. 1970).

> [I]t would seem to the court that extensive operation or direction of the vessel by government personnel would be required to make the vessel operated "by the United States" and something closer to a time charter where the Government directs the vessel's overall functions even though the owner may control the operation of the vessel's personnel and

> equipment rather than a single purpose contract entered into with an independent contractor would be required to make the vessel "operated for the United States."

Id. at 443-444, (footnote citation omitted, emphasis added).

Thus, it is clear that regardless of whether it is general maritime claims, or Jones Act negligence claims, that the same standard applies. For the purposes of Petitioner's motion for summary judgment, it is significant that the Court in *Trautman, supra,* further indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C.§ 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the

clearly erroneous standard as announced in McAllister, supra.

Id. at 445, (emphasis added). [5]

In *Servis v. Hiller Systems Inc.*, 54 F.3d 203 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996), the federal Fourth Circuit Court of Appeal stated that:

> For purposes of the SAA, a primary factor in determining agency status is the degree of operational control exercised by the United States. See, *e.g. Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (reasoning that degree of United States' operational control determines agency status under the Jones Act); *Nelson*, 805 F. Supp. at 847....

Id. at 208. (Emphasis added). [6]

---

[5] Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessels in the Suez Canal. *Id.* at 442.

[6] *See Also: Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837 (D. Hawaii 1992). Plaintiff, captain of a research vessel, brought an action under the Jones Act and general maritime law to recover for his injuries. *Id.* at 840-841. The Court used the operational control test to determine that Research Corporation of the University of Hawaii (RCUH), who was Plaintiff's employer, was not an agent of the United States who was the owner of the boat. There was a bareboat charter agreement between RCUH and the United States Navy. The Court held that: "Looking at both the agreement and the venture as a whole, RCUH was not an agent of the United States. Accordingly, the SIAA is not a bar to Nelson's claim against RCUH." *Id.* at 846-848.

Another case, where operational control was the determining factor as to whether or not the United States was liable under the Suits in Admiralty Act for negligence or unseaworthiness, is *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174 (D. Puerto Rico 1991). In Morales-Melendez, the United District Court for the District of Puerto Rico, summarized the factual background of this litigation as follows:

> This tort action, brought both under diversity jurisdiction and the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-745 (*see* complaint, ¶ 3,4,19) is now before us for resolution of several pending motions. The relevant undisputed facts, as obtained from the myriad of documents on file, are as follows: Plaintiffs Carmelo Morales-Melendez and Alicia Rivera-de-Morales are residents of the town of Yabucoa, Puerto Rico. At the time in which the incidents alleged in the complaint took place, plaintiff Carmelo Morales-Melendez was working as a marine cargo inspector of petroleum products for E.W. Saybolt and Co. (Saybolt). This company, in turn, was contracted by Puerto Rico Sun Oil Co. (Sun Oil) to provide inspection services in relation to petroleum products which were going to be delivered to the M/V PAUL BUCK, a tanker vessel. At that time, the vessel was under a time-charter to defendant United States of America through the Military Sealift Command, an agency of the Department of the Navy; although it was being operated by Ocean Ships, Inc. (Ocean Ships) under the terms of an operating contract entered into with Ocean Freedom Shipping, Inc. (Ocean Freedom), its demise charterer. It is not disputed that Ocean Ships maintained complete control of the manning, provisioning, equipment maintenance and marine operation of the M/V PAUL

> BUCK. The remaining defendant, Steamship Mutual (Steamship), is the vessel's protection and indemnity underwriter.
>
> On March 5, 1988, the M/V PAUL BUCK arrived at Yabucoa, Puerto Rico, and shortly thereafter it was boarded by Mr. Morales-Melendez in order to conduct the inspection of its equipment as required by the contract between Saybolt and Sun Oil. While working on board the M/V PAUL BUCK, Mr. Morales-Melendez suffered a fall, as a result of which he sustained personal injuries....
>
> ****
>
> Mr. Morales-Melendez apparently having concluded all the administrative proceedings required by the Puerto Rico Workmen's Accident Compensation Act (PRWACA), 11 L.P.R.A. §§ 1-42, he then filed this action seeking damages for the injuries allegedly suffered....

Id. at 1175-1176, (footnote citation omitted).

Plaintiffs sued several Defendants and added the United States as a Defendant, by amended complaint. The United States "....filed a motion requesting dismissal or summary judgment in their favor...." Id. at p. 1176. The District Court in *Morales-Melendez, supra,* discussed the United States motion and the reasons for granting it, finding that the Plaintiffs could not state a claim against the government under the Suits In Admiralty Act (SIAA), as follows:

> *The United States' Motion to Dismiss and/or for Summary Judgment*
>
> We now proceed to entertain the arguments raised by the government in its motion to

dismiss and/or for summary judgment. As we previously noted, the government was not an original party to this suit, but was later added by plaintiffs apparently based on a claim made by the original defendants which insisted that, pursuant to the Suits in Admiralty Act, (SIAA) the exclusive remedy in this action lay only against the sovereign. *See* 46 U.S.C. App. § 745. The government has taken an exception to that assessment, however, claiming instead that under the specific facts of this case the SIAA fails to provide a remedy as the exclusivity provision of the statute does not apply.

We agree with the government, as the language of the statute is patently clear in allowing proceedings against the United States only in those circumstances where, if a vessel were privately owned or operated, a proceeding in admiralty could be maintained against the private party. *See* 46 U.S.C. App. § 742. In this case, the undisputed evidence on record shows that the United States was merely acting as a time charterer without operational control of the PAUL BUCK when the accident which originated this litigation took place. *See* Time Charter Party between Ocean Freedom Shipping, Inc. and The United States of America, Art. 35, Art. 22 (a). As the general rule on a time charterer's liability is that it assumes no liability flowing from the unseaworthiness of the vessel or the negligence of the crew unless it is shown that the parties to the charter intended otherwise, *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 647 (5th Cir. 1989), *Hayes v. Wilh Wilhelmsen Enterprises, Ltd.*, 818 F.2d 1557, 1559 (11th Cir. 1987), *Atlantic Richfield Co. v. Interstate Oil Transport Co.*, 784 F.2d 106, 113-114 (2d Cir. 1986), no claim in admiralty lies against the

> United States and, therefore, no action can be properly maintained against it under the SIAA. *See Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989). Hence, summary judgment must be entered in favor of the United States.

Id. at 1179-1180, (footnote citations omitted, emphasis added).

As extensively discussed in Respondent's trial court memorandums, Respondent respectfully submits that it is quite clear that the operational control of the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer.

Under the terms of the operating contract introduced into evidence by Respondent at the September 3rd hearing, as Exhibit 4 in globo, the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Waterman Steamship Corporation.[7] According to the operating contract, employees of the operator, Waterman, remained Waterman employees at all times. It is further significant that as provided in the terms of the operating contract, Waterman was to maintain insurance on the vessel at all times. (Operating Contract, pp. 2-4).

The Petitioner also has not presented any document which demonstrates that the Government has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Respondent Herbert Anderson. Instead as the operating contract clearly details, the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Respondent Herbert Anderson.

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[7] The operating contract is discussed in greater detail in the next section of this brief. Respondent has not reproduced this document in the Appendix, since it is a lengthy document, but has set out pertinent parts, in the next section for the Court's review.

Further, the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, does not even remotely resemble the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Respondent's personal injuries from his employer Waterman to the United States. Thus, it is respectfully submitted that Respondent has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of the Suits in Admiralty Act, and thus, the Trial Court Judge's ruling denying the motion for summary judgment should be upheld.

III. THE LOUISIANA SUPREME COURT WAS CORRECT IN DENYING WRITS, AND THE FOURTH CIRCUIT COURT OF APPEAL WAS CORRECT IN DENYING PETITIONER'S APPLICATION FOR SUPERVISORY WRITS AND FINDING THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER WATERMAN STEAMSHIP CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AND LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS MATTER.

As stated earlier, the Petitioner has not presented any document which demonstrates that the Government has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Respondent Herbert Anderson. Instead as the operating contract, clearly details, the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Respondent Herbert Anderson.

In the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985. (An excerpt of the Time Charter party agreement was introduced into

evidence by Respondent at the September 3rd hearing as Exhibit 1). There is a bareboat charter between the owner of the S.S. MAJOR STEPHEN W. PLESS, Wilmington Trust Company, a Delaware banking corporation, and WTAK-3, Inc., a company out of New York. This bareboat charter was amended and restated as of May 1, 1985. (An excerpt of the Bareboat Charter was introduced into evidence by Respondent at the September 3rd hearing as Exhibit 2).

During discovery in this matter Petitioner produced an Operating Contract and two letters; one dated May 1, 1985 to the Commander of the Military Sealift Command and signed by the Vice President of Waterman Steamship Corporation, and one dated February 10, 1983 and signed by the President of Waterman Steamship Corporation. By far the most important document which is determinative of who had operational control over the S.S. MAJOR STEPHEN W. PLESS, is the Operating Contract between Waterman Steamship Corporation, and WTAK-3, Inc., which is dated as of May 1, 1985 and amended and restated as of June 12, 1985.

In the operating contract which Respondent obtained from Petitioner Waterman through discovery, WTAK-3 is referred to as the "Contractor", and Waterman Steamship Corporation is referred to as the "Operator". The United States of America, acting by and through the Contracting Officer, Military Sealift Command, Department of the Navy, is referred to as the Government. The operating contract refers to the Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985. (Operating Contract, p. 1).

The operating contract provides in pertinent part that:

> WHEREAS, the Contractor and the Operator desire to amend and restate the Operating Contract dated as of January 14, 1983 and first amended and restated as of May 1, 1985, to provide for the Operator to manage the Vessel and the

Containers in order to facilitate the Contractor's performance of its obligations to the Government under the Agreement to Charter and Time Charter; and

NOW, THEREFORE, the parties hereto agree to amend and restate the Operating Contract in its entirety as follows:

****

2. In order to facilitate the performance by the Contractor of its obligations under the Time Charter and the Agreement to Charter, the Contractor hereby appoints the Operator and the Operator hereby agrees to act as manager of the Vessel and the Containers and in that capacity and subject as hereinafter provided the Operator shall, during the term of this Operating Contract, have and be entrusted with the management, operation, maintenance and repair of the Vessel and the Containers and shall assist the Contractor in the full and faithful performance of the Contractor's obligations under the Time Charter and the Agreement to Charter and shall efficiently and faithfully serve the Contractor in connection with such management and the exercise of the powers hereby conferred upon the Operator. In performing its obligations and duties under this Operating Contract, the Operator shall act in a manner entirely consistent with the Contractor's obligations and duties to the Government under the Agreement to Charter and the Time Charter. Nothing in this Operating Contract shall relieve the Contractor of its duties and obligations under the Agreement to Charter or the Time Charter. All employees of the Operator engaged in the management and operation of the Vessel and the Containers hereunder

shall always be the employees of or seconded to the Operator and not employees of the Contractor for any purpose whatsoever. In performing its obligations hereunder, the Operator shall act as an independent contractor.

3. As such, the Operator shall, without in any way detracting from the generality of its duties and powers hereunder, properly maintain the Vessel and the Containers and perform the following services and act in or do all or any of the following acts in the name or on behalf of the Contractor:

****

(b) Place and maintain all insurance relating to the Vessel and the Containers in such manner and upon such terms as the Contractor shall be required to place and maintain in accordance with Articles 10 and 37 of the Time Charter, Article 12 of the Bareboat Charter and Article 12 of the Container Lease....

****

(d) Maintain all equipment, machinery and supplies necessary for the full and efficient operation of the Vessel and the Containers.

(e) Maintain the Vessel and the Containers in a good state of repair and in efficient operating condition and in accordance with good commercial practice and the requirements of the Time Charter.

(f) Arrange for and supervise drydockings, surveys, maintenance, repairs, renewals, alterations, betterments and upkeep of the Vessel and the Containers....

(g) Procure the services of the Master and all officers and crew, all of whom shall be employees of the Operator (or subject to the Time Charterer's approval, a subcontractor thereof), and superintendents, surveyors and other necessary personnel as shall be necessary or appropriate for the efficient operation and maintenance of the Vessel and the Containers.

(h) Bring or defend any such action, suit or proceeding for the account of and on behalf of the Contractor and the Vessel or the Containers, but only if such action, suit or proceeding relates to any right or obligation of the Contractor under the Time Charter, the Agreement to Charter, the Bareboat Charter or the Container Lease, or otherwise relates to the management, operation, maintenance, financing or repair of the Vessel or the Containers.

(i) Keep the Contractor and the Government thoroughly and promptly informed regarding any incident which gives or may give rise to claims or controversies involving third parties.

(Operating contract, pp. 2-4, emphasis added).

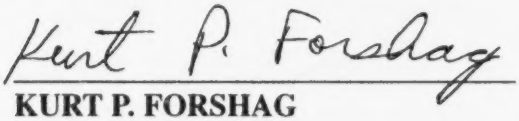
Respondent respectfully submits that considering the operating contract and the venture as a whole, it is quite clear that the operational control of the S.S. MAJOR STEPHEN W. PLESS, was at all times with Waterman Steamship Corporation, not the United States, who is a time charterer. Alternatively, there are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate. *Davis v. Bd. Of Supervisors of La. State University et al,* 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La.6/26/98), 719 So.2d 1288.

CONCLUSION

The rulings of the Louisiana State Courts which Petitioner has presented to this court do not qualify as a final judgment within the meaning of 28 U.S.C. § 1257 (a). Thus, Petitioner's writ application should be dismissed for want of a final judgment.

Respondent respectfully submits that he has demonstrated through his pleadings, this Writ Opposition and the exhibits Respondent introduced in the lower courts, that he has set forth specific facts showing that there are genuine issues of material fact for trial. It is respectfully submitted that this Honorable Court should uphold the lower court's rulings and Respondent should be permitted to proceed to trial against Waterman Steamship Corporation.

Respectfully submitted,



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